



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2018-0970]

RIN 1625-AA11

Regulated Navigation Area; Thea Foss and Wheeler-Osgood Waterways EPA

Superfund Cleanup Site, Commencement Bay, Tacoma, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; withdrawal of two previous notices of proposed rulemaking.

SUMMARY: The Coast Guard proposes to amend the Thea Foss and Wheeler-Osgood Regulated Navigation Area (RNA) for Commencement Bay to include portions of the Middle Waterway in Tacoma, Washington. This proposed amendment would protect sediment cap areas in the U.S. Environmental Protection Agency's Commencement Bay Nearshore-Tideflats Superfund Cleanup Site within the Middle Waterway Problem Area that are not geographically encompassed by the existing Thea Foss and Wheeler-Osgood RNA. The modified RNA would prohibit certain activities that could disrupt the integrity of the engineered sediment caps that have been placed within the Middle Waterway Problem Area. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments identified by docket number USCG-2018-0970 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the SUPPLEMENTARY INFORMATION section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Petty Officer Zachary Spence, Sector Puget Sound Waterways Management Branch, U.S. Coast Guard; telephone 206-217-6051, email SectorPugetSoundWWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CB-NT	Commencement Bay Nearshore-Tideflats
CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
RNA	Regulated navigation area
§	Section
U.S.C.	United States Code

II. Background, Purpose, and Legal Basis

The Middle Waterway is part of the Commencement Bay Nearshore-Tideflats Environmental Protection Agency Superfund Cleanup Site, and is located between the Thea Foss Waterway and the St. Paul Waterway in Commencement Bay, Washington. The Coast Guard has engaged in preliminary discussions with the Middle Waterway Action Committee to establish a RNA for certain portions of the Middle Waterway of Commencement Bay, Tacoma, WA, to protect five engineered sediment caps from activities that could disrupt the integrity of the caps within the CB-NT Superfund Cleanup Site. While the Thea Foss and Wheeler-Osgood Waterways EPA Superfund

Cleanup Site, 33 CFR 165.1329, protects certain sites outside the Middle Waterway, sediment caps within the Middle Waterway are not currently protected.

Under the Ports and Waterways Safety Act, the Coast Guard has the authority to establish RNAs in defined water areas that are determined to have hazardous conditions and in which vessel traffic can be regulated in the interest of safety. See 33 U.S.C. 1231 and Department of Homeland Security Delegation No. 0170.1. Coast Guard District Commanders are granted authority under 33 CFR 165.11 to regulate vessel traffic in areas with hazardous conditions.

This proposed rule is necessary to prevent disturbance of the sediment caps established in the Middle Waterway Problem Area of the Superfund Cleanup Site that are not geographically encompassed by the Thea Foss and Wheeler-Osgood Waterways RNA. Disruption of the integrity of the caps in this area may result in a hazardous condition and harm to the marine environment and the public. Therefore, this proposed RNA expansion is necessary to protect the integrity of the caps and will do so by prohibiting maritime activities that could disturb or damage them. Enforcement of this amended RNA would be managed by Coast Guard assets including Vessel Traffic Service Puget Sound through vessel Automated Identification System monitoring. The Captain of the Port Puget Sound might also be assisted by other state, local, or government agencies in the enforcement of this proposed rule.

In 2006 and 2015, the Coast Guard issued NPRMs related to this issue. As reflected in their identical titles, “Regulated Navigation Area; Middle Waterway EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA,” both were focused on the Middle Waterway site. No comments were submitted in response to either NPRM (71

FR 12654, March 13, 2006, and 80 FR 42440, July 17, 2015) nor did we publish any other documents in either of those rulemakings. We are withdrawing those NPRMs because we have decided to start with this new NPRM to address this issue by expanding the Thea Foss and Wheeler-Osgood Waterways EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA RNA, which was established in 2010, to encompass the Middle Waterway sediment caps.

III. Discussion of Proposed Rule

The Coast Guard proposes to amend an existing RNA, the Thea Foss and Wheeler-Osgood Waterways EPA Superfund Cleanup Site, 33 CFR 165.1329, to include the Middle Waterway. Within this designated area, vessels would be prohibited from conducting certain activities, including anchoring, trawling, spudding, or other activities that involve disturbing the integrity of the sediment caps. Activities that involve remediation efforts of the CB-NT Superfund Cleanup Site would not be prohibited. In addition, we propose to amend the title of the section to include the Middle Waterway. The amended portion of this RNA encompasses approximately 0.074 additional square miles of the waterway. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and executive orders and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This NPRM has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the small geographic area encompassed by the RNA, and the limited amount of commercial and recreational traffic passing through the area. Additionally, prohibited activities are not routine in the designated area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the regulated navigation area may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see ADDRESSES) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

In preparation for this rulemaking, we identified the area encompassed by the proposed rule overlaps with the usual and accustomed fishing grounds for the Puyallup

and Muckleshoot tribes. We informed both tribes of the proposed rulemaking, but only received a response from the Muckleshoot tribe. We conducted a meeting with the Muckleshoot tribe's Fish Commission on September 12, 2018. During this meeting, the Muckleshoot Fish Commission and the Coast Guard discussed potential impacts of the proposed rulemaking on the Muckleshoot tribe. Following the meeting, the Coast Guard concluded that this proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, as it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

If you believe this proposed rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard

in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves amending a regulated navigation area that would prohibit activities that could disturb the engineered sediment caps on the seabed. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023-01-001-01, Rev. 01. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under ADDRESSES. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the FOR FURTHER INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <http://www.regulations.gov>. If your material cannot be submitted using <http://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, visit <http://www.regulations.gov/privacyNotice>.

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at <http://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165 – REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. In § 165.1329, revise the section heading, add paragraph (a)(4), and revise paragraphs (b)(1) and (2) to read as follows:

§ 165.1329 Regulated Navigation Area; Thea Foss, Middle Waterway, and Wheeler-Osgood Waterways EPA Superfund Cleanup Site, Commencement Bay, Tacoma, WA.

(a) * * *

(4) All waters of the Middle Waterway south of a line connecting a point of the shore at 47° 15' 51" N, 122° 25' 53" W; thence southwest to 47° 15' 48.6858"N, 122° 26' 02.2374" W; thence south to 47° 15' 46.7316" N, 122° 26' 1.1214" W [Datum: NAD 1983].

(b) * * * (1) All vessels and persons are prohibited from activities that would disturb the seabed, such as anchoring, dragging, spudding, or other activities that involve disrupting the integrity of the sediment caps installed in the designated regulated navigation area, pursuant to the remediation efforts of the U.S. Environmental Protection Agency (EPA) and others in the Thea Foss, Middle Waterway, and Wheeler-Osgood Waterways EPA superfund cleanup site. Vessels may otherwise transit or navigate within this area without reservation.

(2) The prohibition described in paragraph (b)(1) of this section does not apply to vessels or persons engaged in activities associated with remediation efforts in the Thea Foss, Middle Waterway, or Wheeler-Osgood Waterways superfund sites, provided that the Captain of the Port, Puget Sound (COTP), is given advance notice of those activities by the EPA.

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Dated: March 1, 2019

David G. Throop,
Rear Admiral, U.S. Coast Guard,
Commander, Thirteenth Coast Guard District.

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